Supreme Court, U.S.
FILED
MAY 18 1994
OFFICE OF THE CLERK

No. 93-1839

IN THE

Supreme Court of the United States

October Term, 1993

ATLANTIC STATES LEGAL FOUNDATION, INC.,
Petitioner,

vs.

EASTMAN KODAK COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Clean Water Act prohibit the discharge of pollutants not listed in a discharger's permit?

2. Is a state permit condition prohibiting the discharge of pollutants not specifically authorized in the discharger's permit enforceable in a Clean Water Act citizen suit?

Atlantic States Legal Foundation, Inc. is a not-for-profit corporation with no parents or subsidiaries.

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JURISDICTION OF THE UNITED STATES SUPREME COURT

The Atlantic States Legal Foundation, Inc. ("Atlantic States") brought this suit against Eastman Kodak Company ("Kodak") in the Western District of New York pursuant to 33 U.S.C § 1365(a). The district court entered judgment against Atlantic States on December 28, 1992.

Atlantic States appealed. The Second Circuit Court of Appeals affirmed on December 14, 1993. A petition for rehearing, with suggestion for rehearing in banc, was filed. The petition for rehearing was denied on February 17, 1994.

The jurisdiction of this Court to review the decision of the Second Circuit arises under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are based primarily on 33 U.S.C. § 1251, et. seq., and more specifically 33 U.S.C. §§ 1251, 1311, 1312, 1314, 1342, 1362, 1365, and 1370. The regulations involved include 40 C.F.R. parts 122 and 123, and more specifically, 40 C.F.R. Parts 122.4, 122.41, 123.1(g)(1), 123-1(i) and (i)(2), and 123.25. The central New York statute involved is NY-ECL § 17-0815(3). The relevant sections of the above statutes and regulations are reprinted in the Appendix to this petition. (A37-A90).

STATEMENT OF THE CASE

Respondent Eastman Kodak Company ("Kodak") owns and operates an industrial facility, known as Kodak Park, in Rochester, New York. In the course of its operations, Kodak discharges up to 30 million gallons per day of wastewater into the Genesee River from Kodak Park via its King's Landing wastewater treatment plant.

Kodak holds a State Pollutant Discharge Elimination System ("SPDES") permit authorizing the discharge of limited quantities of specific pollutants into the Genesee River and Paddy Hill Creek. The permit was issued to Kodak by the New York State Department of Environmental Conservation ("DEC"), pursuant to 33 U.S.C. § 1342 and NY-ECL Article 17, Title 8, with an effective

date of November 1, 1984.[1]

General Condition 1(b) of the permit provides, in pertinent part, that "the discharge of any pollutant not identified and authorized . . . by this permit shall constitute a violation of the terms and conditions of this permit". (JA-64).[2] This condition is mandated by New York law. NY-ECL § 17-0815(3). It is undisputed that Kodak is discharging at least 16 pollutants that are not "identified and authorized" by Kodak's permit.

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1 Under the Clean Water Act and New York law, SPDES permits may be issued for a period not exceeding five years. The expiration date of Kodak's SPDES permit was November 1, 1989. (A-55). There is no dispute in the present action, however, that the permit will remain in effect until such time as the DEC issues a renewal permit to Kodak. Kodak applied for renewal in May, 1989. No renewal permit has yet become effective.

2 References to "JA-#" are to the Joint Appendix provided to the Second Circuit. References to "A#" are to the Appendix to this brief.

Petitioner Atlantic States Legal Foundation, Inc. ("Atlantic States") filed this case on November 14, 1991, alleging that Kodak is violating section 301(a) and section 402 of the Federal Water Pollution Control Act (the "Clean Water Act" or the "Act"), 33 U.S.C. § 1311(a) and § 1342, by discharging into the Genesee River more than 300,000 pounds per year of toxic pollutants that are not "identified and authorized" by Kodak's SPDES permit.

The District Court has subject matter jurisdiction pursuant to 33 U.S.C. § 1365(a), which authorizes citizens to bring actions ("citizen suits") against persons alleged to be in violation of "an effluent standard or limitation" under the Act. For purposes of section 1365(a), the term "effluent standard or limitation" is defined to include an

unlawful act under (1) section 1311(a), or (2) a violation of a permit or permit condition issued under section 1342. 33 U.S.C. 1365(f). Before commencing this action, Atlantic States fulfilled all applicable notice requirements pursuant to 33 U.S.C. 1365(b).

On August 21, 1992, Atlantic States moved for partial summary judgment on Kodak's liability for discharging 16 pollutants not authorized by its permit.[3] On September 2, 1992, Kodak cross-moved for summary judgment. The motions were argued before the District Court on September 16, 1992. The District Court denied Atlantic States' motion, and

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[3] All 16 of these unauthorized pollutants are designated as toxic chemicals under Section 313(c) of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11023(c). Atlantic States moved for partial summary judgment on liability with respect to these pollutants because there is no genuine issue of material fact with respect to their discharge by Kodak. (A8).

granted Kodak's motion, on December 28, 1992. (A35).

In dismissing the action, the District Court held that Kodak's discharges of pollutants not expressly identified and authorized by its SPDES permit do not constitute violations of the Clean Water Act enforceable via a citizen suit pursuant to 33 U.S.C. § 1365.

The Second Circuit affirmed the District Court on December 14, 1993. The Second Circuit decision expanded the District Court ruling by holding that the discharge of pollutants not listed in a SPDES permit is not unlawful under the Clean Water Act. (A3,9-10). In the alternative, the Second Circuit also held that a state permit condition prohibiting the discharge of pollutants not specifically authorized in the permit was

broader than the scope of the Clean Water Act and thus unenforceable by a citizen-plaintiff. (A3,15).

REASONS FOR GRANTING THE WRIT

The Second Circuit's opinion fundamentally misconstrues the control provisions of the Clean Water Act. The vast majority of courts interpreting the Clean Water Act have found that the Act prohibits permittees from discharging pollutants not authorized in their permits. The Second Circuit, however, held that, once a discharger has a permit to discharge limited quantities of specified pollutants, it is then free to discharge any other pollutants at any other levels it desires.

The Second Circuit's decision directly contradicts the plain language of the Clean Water Act, conflicts in principle with this Court's decision in

E.I. du Pont de Nemours v. Train, and other Supreme Court decisions, and directly conflicts with other federal district court decisions. The Second Circuit's decision, if allowed to stand, will profoundly and negatively affect not only the administration of the Act by the Environmental Protection Agency (EPA) and state regulatory agencies, but also the ability to reach the Act's clear goal of elimination of the discharge of pollutants into the nation's waters.

POINT I. The decision below directly contradicts the plain language and intent of the Clean Water Act.

As Congress has clearly stated, and this Court has previously recognized, "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1); E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112, 116 (1977)

(emphasis added). This language remains in the Clean Water Act today, even though the Act was amended in 1987, two years after the statutory goal of pollution elimination had passed.

The Second Circuit's holding that the discharge of pollutants not listed in a permit is lawful could not more clearly contradict the plain language of the statute.

As the court held:

> Atlantic States treats permits as establishing limited permission for the discharge of identified pollutants and a prohibition on the discharge of unidentified pollutants. Viewing the regulatory scheme as a whole, however, it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements.

(A9). This interpretation of the "regulatory scheme" by the Second Circuit

ignores the plain meaning and intent of the "statutory scheme". The statute does not authorize the regulatory interpretation inferred by the Second Circuit.

A. The statutory scheme

The beginning point of the Act's statutory scheme is section 301(a). 33 U.S.C. § 1311(a). Section 301(a) provides, in part: "Except as in compliance with [various sections of the Act], the discharge of any pollutant by any person shall be unlawful." Id. One of the exceptions to this blanket prohibition on the discharge of any pollutant is section 402, 33 U.S.C. § 1342, which provides, in part, that "the Administrator may ...issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section [301(a)] ...." 33

U.S.C. § 1342(a)(1). Together, sections 301(a) and 402 establish the essential structure for regulating point sources of pollution; no discharge of a pollutant is allowed without a permit.

As explained more fully below, Congress intentionally included the entire universe of polluters and pollutants within the scope of the Act. Only a universal approach could possibly achieve "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 ...." 33 U.S.C. § 1251(a)(1).

Consistent with the universal approach to controlling water pollution, section 303 of the Act requires states, with federal approval and oversight, to adopt comprehensive standards to assure protection of water quality. 33 U.S.C. § 1313. In general, state standards may be

more but not less strict than federal standards. Id. State water quality standards provide a "supplementary basis ... so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels". EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 n.12 (1976).

The Act encourages states to administer NPDES programs following EPA approval. 33 U.S.C. § 1342(b). EPA's regulations implementing this provision of the Act require state permit programs to, at a minimum, meet the requirements of the federal program. See 40 C.F.R. §§ 123.1-123.64 (1993).

1. The Clean Water Act and polluters

Section 301(a) of the Act prohibits "the discharge of any pollutant by any person" in the absence of a permit. 33 U.S.C. § 1311(a)(emphasis added). The language clearly and unambiguously applies to all persons and all pollutants.

Despite this universal language, in 1973 EPA adopted regulations that excluded "minor" polluters from the NPDES program. In Natural Resources Defense Council v. Costle, 568 F.2d 1369, 1372 n.5 (D.C. Cir. 1977) the District of Columbia Circuit struck down EPA's attempt at regulatory exclusion because "Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of § 301(a)." The court rejected EPA's argument that a more

limited program, focused exclusively on significant polluters, would be more efficient and better serve the purposes of the Act. The court noted that Congress had considered and rejected such efficiency arguments when it enacted section 301(a):

> Under the EPA's interpretation the Administrator would have broad discretion to exempt large classes of point sources from any and all requirements of the [Act]. This is a result that legislators did not intend. Rather they stressed that the [Act] was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type.

Id. at 1375; see also, id. at 1377-82 (discussing legislative history). The Court then concluded:

> In sum, we conclude that the existence of uniform national effluent limitations is not a necessary precondition for incorporating into the NPDES program pollution from agricultural, silvicultural, and storm water runoff point

> sources. The technological or administrative infeasibility of such limitations may result in adjustment in the permit programs ... but it does not authorize the Administrator to exclude the relevant point source from the NPDES program.[4]

Id. at 1379.

Subsequent to the NRDC v. Costle opinion, EPA significantly broadened the

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[4] In Natural Resources Defense Council, Inc. v. Reilly, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,108 (D.D.C. 1991), the court also found that an attempt by EPA to exclude certain categories of polluters from the requirements of § 301(m), 33 U.S.C. § 1311(m), was contrary to the comprehensive coverage required by Congress. The court found:

> [U]nder [EPA's] interpretation of the statute, EPA avoids altogether the ... requirement to promulgate guidelines by selectively omitting industries from the agency's § 301(m) plan -- industries which the agency knows discharge toxic and non-conventional pollutants. Surely the Congress which passed § 301(m) out of frustration with the agency's sluggishness did not intend to confer upon the agency discretion to limit the scope and set the pace of effluent guidelines preparation simply by refraining from "identifying" known polluters.

22 Envtl. L. Rep. at 20,111.

scope of its NPDES program to apply to all point source polluters. In some cases EPA issued "general" or "area" permits for efficiency reasons, but it was able, when pressed, to sweep all point source polluters into the program in some form, as required by the Act.

2. The Clean Water Act and pollutants

Just as the Act regulates all polluters, the Act also clearly and unambiguously targets all pollutants. Section 301 does not provide that the discharge of "some" pollutants shall be unlawful in the absence of a permit. It says the discharge of "any" pollutant by "any" person shall be unlawful in the absence of a permit. 33 U.S.C. § 1311(a).

Section 402 of the Act authorizes EPA to issue NPDES permits allowing discharges of pollutants notwithstanding

section 301(a), but narrowly circumscribes EPA's discretion in issuing such permits. 33 U.S.C. § 1342(a). To achieve the zero discharge goal of the Act, the National Pollutant Discharge Elimination System is intended, as its name suggests, to eventually eliminate the discharge of all pollutants. The universal language in the opening provisions of sections 301 and 402 is consistent with the subsequent substantive provisions of these sections, which plainly envision progressively tighter regulation of each and every pollutant discharged to the nation's waters.

a. Section 301 and reasonable further progress towards eliminating the discharge of all pollutants

Subsection (b) of section 301 of the Act makes clear that Congress intended EPA to do much more than simply hold the

line when regulating pollutants being discharged to the nation's waters. Congress expected EPA to achieve progress towards specific goals which are described in the Act as applying to all "pollutants."

Subsection (b) divides discharges into two categories: direct dischargers and indirect dischargers. See 33 U.S.C. §§ 1311(b)(1)(A), (b)(1)(B). Direct dischargers are subject to two phases of effluent limitations: (1) best practicable control technology (BPT), which was to be achieved by July 1, 1977, and (2) more stringent best available technology economically achievable (BAT), which was to be achieved by March 31, 1989. 33 U.S.C. 1311(b)(1)(A), (b)(2)(A). See generally, Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 118 (1984)

(describing two categories of dischargers). Effluent from indirect discharges directly to the nation's waters must meet requirements similar to those imposed on direct dischargers.[5]

In addition to requiring the progressive tightening of effluent limits through phased in BPT and BAT standards, section 301(b)(2)(A) requires that "there shall be achieved ... reasonable further

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[5] NRDC successfully sued EPA to force the agency to apply to indirect dischargers essentially the same standards that apply to direct dischargers. See Natural Resources Defense Council, Inc. v. Train, 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,588 (D.D.C. 1976), modified sub nom., Natural Resources Defense Council, Inc. v. Costle, 9 Envtl. L. Rep. (Envtl. L. Inst.) 20,176 (D.D.C. 1979), modified sub nom., Natural Resources Defense Council, Inc. v. Gorsuch, No. 72-2153 (D.D.C. Oct. 26, 1982), modified sub nom., Natural Resources Defense Council, Inc. v. Ruckelshaus, No. 73-2153 (Aug. 2, 1983). See generally Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 119 n.4 (1985); Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229, 1243-44 (D.C. Cir. 1980) (describing the legislative history of the 1977 Act amendments).

progress toward the national goal of eliminating the discharge of all pollutants ...." 33 U.S.C. § 1311(b)(2) (emphasis added). Section 301(b)(2)(C) requires that effluent standards be established for "all toxic pollutants referred to in [a specific list compiled by Congress]... in no case later than March 31, 1989...", 33 U.S.C. § 1311(b)(2)(C), and section 301(b)(2)(D) requires that effluent standards be established and applied for "all toxic pollutants listed ... [in] section 307 of this title which are not referred to in subparagraph (C) ... in no case later than March 31, 1989 ...." 33 U.S.C. § 1311(b)(2)(D). Finally, section 301(b)(2)(F) contains a residual clause providing that "for all pollutants [other than specified exceptions] ... compliance with effluent limitations in accordance

with subparagraph (A) of this paragraph [shall be achieved] ... in no case later than March 31, 1989." 33 U.S.C. § 1311(b)(2)(F).

For conventional pollutants, dischargers are allowed to use "innovative technology," so long as that technology "moves toward the national goal of eliminating the discharge of all pollutants. ..." 33 U.S.C. § 1311(k). In section 301(m), Congress created an exception from the "reasonable further progress" requirement for biochemical oxygen demand (BOD) and pH in discharges to deep waters of the territorial sea. 33 U.S.C. § 1311(m).[6] The fact that Congress carved out a narrow exception from the "reduce to zero" goal for these two pollutants reinforces the conclusion

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[6] Dischargers may take advantage of this exception only by meeting a set of strict conditions.

that when Congress directed reasonable further progress towards eliminating all pollutants, it indeed meant all pollutants, and expected EPA to adopt a universal regulatory approach.

b. Section 402 and limitations on issuing permits.

Section 402 is equally clear that a permit may be granted only after EPA permits writers apply the standards of the Act to all pollutants discharged by a permit applicant. Section 402 provides that only to the extent that EPA issues "a permit for the discharge of any pollutant or combination of pollutants" will section 301(a)'s prohibition on discharges be altered. 33 U.S.C. § 1342(a)(1). Congress plainly anticipated that its permit program would sweep in all pollutants. It did not say permits are required for the discharge of "significant pollutants" or "toxic

pollutants." It said permits are required for the discharge of "any pollutant." Id.

Congress also carefully circumscribed EPA's power to issue permits. Permits may be issued only:

> upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this Act, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

Id.

This provision expressly limits EPA's authority to grant permits to two circumstances. If EPA has adopted a national effluent limitation for a particular pollutant, EPA may grant permission to an applicant to discharge that pollutant only in conformity with

the national standard. If a national standard has not yet been adopted for a particular pollutant, EPA may grant permission to discharge the pollutant only by applying the relevant standards of the Act (BPCT or BAT) under conditions the EPA Administrator has determined are necessary to carry out the purposes of the act. 33 U.S.C. § 1342(a)(1)(B). Based upon the language and legislative history of the Act, the Administrator has chosen to meet this requirement by instructing permit writers to exercise Best Professional Judgment (BPJ) on a permit-by-permit basis to regulate pollutants for which no national effluent standard has been adopted.

Section 402(a)'s order that EPA carry out the provisions of the Act pending promulgation of national effluent standards demonstrates that Congress

wanted immediate movement, on a pollutant-by-pollutant basis, towards the zero discharge goal of the Act. Congress recognized that national effluent standards for all industrial categories and all pollutants could not be imposed immediately because such standards require time to develop, but Congress was not willing to wait for the development of those standards before regulating all pollutants. Therefore, the Act forbids EPA from issuing permits without first applying national effluent limitations or exercising BPJ for each and every pollutant.

To insure that discharges meet "such conditions as the Administrator determines are necessary to carry out the provisions of [the Act]," permit writers were directed by the Administrator to apply BPJ on a permit-by-permit basis.

33 U.S.C. § 1342(a)(1). The "provisions of the Act" referred to in the section include the fundamental requirement that standards applied to pollutants achieve "reasonable further progress" towards the zero discharge goal of the Act. 33 U.S.C. § 1311(b)(2)(A).[7]

Indeed, EPA has conceded that "technology based treatment requirements under Section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under Section 402 of the Act." 40 C.F.R. § 125.3(a)(2)(1993). These standards are imposed on a

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[7] EPA itself has recognized that the "reasonable further progress" requirement applies to both national effluent standards and standards imposed by permit writers exercising BPJ on a case-by-case basis. See 40 C.F.R. § 122, Appendix A (1993) (requiring that any permit issued after June 30, 1981, to dischargers in particular industrial categories "shall include effluent limitations and a compliance schedule to meet the requirements of section 301(b)(2)(A), (C), (D), (E), and (F) of Act, whether or not applicable effluent limitations [sic] guidelines have been promulgated").

pollutant specific basis in setting national standards, and are plainly intended to be applied on the same basis in setting permit-specific standards. EPA has also recognized: "For effluent limitations established on a case-by-case basis based on Best Professional Judgment (BPJ) under Section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987," this means that the "best control technology currently available" standard must be achieved through permit conditions by no later than March 31, 1989. 40 C.F.R. § 125.3(a)(2)(i)(B) (1993).

Thus, EPA has allowed permit writers to simply accept existing levels of discharges for many pollutants in lieu of applying BPJ to determine standards for each pollutant. EPA requires the disclosure of only a limited set of

pollutants in NPDES permit applications, and only a limited number of these disclosed pollutants are regulated through the exercise of BPJ. Furthermore, EPA imposes no regulatory controls on pollutants that are not among those that must be disclosed in a NPDES permit application. EPA's passive acquiescence in accepting existing discharge levels for so many pollutants violates section 402's requirement that EPA exercise BPJ to impose the "best control technology currently available" and achieve "reasonable further progress" towards the Act's zero discharge goal for all pollutants.

In addition to limiting EPA's power to issue permits by requiring that all permits be based either on national effluent guidelines or on the application of case-by-case standards through the

exercise of BPJ, Congress inserted an anti-backsliding provision into section 402 of the Act which prohibits permit writers from including less restrictive requirements in subsequent permits. This provision applies even if the national standards adopted for a particular pollutant subsequent to the issuance of a permit based on BPJ for that pollutant are less strict than the permit-specific BPJ derived standards. 33 U.S.C. § 1342(o). This anti-backsliding provision focuses on pollutants and is consistent with the "reasonable further progress" requirements of section 301.

The Act's permitting scheme has a number of advantages from a regulatory perspective. It consistently places the burden on the polluter to disclose all pollutants contained in its effluent and to seek permission to discharge those

pollutants. By making every discharge of a pollutant illegal unless specifically authorized, the Act provides strong incentives for polluters to disclose and seek permission to discharge every pollutant coming from a facility, and to comply with all permit conditions imposed by EPA. The scheme eliminates the need for EPA to prove that dischargers are violating water quality standards, which allows EPA to focus on pollutants as they come out of the pipe.[8] The Act grants EPA a reasonable measure of discretion in setting effluent limitations for pollutants on a permit-by-permit basis pending promulgation of national effluent guidelines, so long as the case-by-case

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8 One of the main thrusts of the 1972 amendments to the Act was to shift the emphasis in the Act from the protection of water quality standards to the regulation of end-of-the-pipe discharges. This strategy lead to the Act's ultimate zero-discharge goal.

effluent limitations in a permit reflect the exercise of BPJ, apply the appropriate Act standards, and advance the goals of the Act. If a permit holder desires an exception from this regulatory scheme, the Act defines a limited number of conditions under which exceptions may be allowed, and places the burden on the permit holder to demonstrate its eligibility for the exception.

POINT II. The Second Circuit's decision conflicts in principle with this Court's prior decisions involving the Clean Water Act.

This Court has repeatedly recognized that the Clean Water Act makes the discharge of any pollutant unlawful except as authorized by a permit issued pursuant to section 1342. See, e.g., Milwaukee v. Illinois, 451 U.S. 304, 310-311 (1981) ("it is illegal for anyone to discharge pollutants into the nation's waters except pursuant to a permit");

Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 205 (1976) ("it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms"). In E.I. du Pont de Nemours v. Train, 430 U.S. 112, 119 (1977), this Court again recognized that section 301(a) prohibits the discharge of any pollutant unless in compliance with certain enumerated provisions of the Act, including section 402. The Court acknowledged that an enforceable "effluent standard or limitation," as defined by section 505(f) of the Act, can be created by either section 301 or section 402. Id. at 133.

In DuPont, this Court rejected industry arguments that section 402 "provides the only statutory authority for the issuance of enforceable

limitations on the discharge of pollutants by existing plants." Id. at 120. The Court expressly noted that "although this section authorizes the imposition of limitations in individual permits, the section itself does not mandate either the Administrator or the States to use permits as the method of prescribing effluent limitation." Id. In other words, effluent limitations other than those in permits (for example, section 301(a)'s prohibition on unauthorized discharges) may be enforced separately from permit conditions.[9]

In EPA v. California, ex rel. State Water Resources Control Board, 426 U.S. 200, (1976) this Court noted:

> An NPDES permit serves to transform generally applicable

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9 Section 505(f) of the Act, 33 U.S.C. § 1365(f), defines "effluent standard" as including an unlawful act under § 301(a). Section 301(a) makes an unpermitted discharge unlawful.

> effluent limitations and other standards -- including those based on water quality -- into the obligations (including a timetable for compliance) of the individual discharger ....

Id. at 205. The Second Circuit opinion describes NPDES permits as having a different purpose than that described by this Court in EPA v. California. Rather than viewing NPDES permits as a means of transforming general standards into specific limits tailored to individual discharges, the Second Circuit views permits as shields against enforcement actions based upon matters not covered by a permit. But as explained in E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112 (1977), a permit must be issued in compliance with the Act before it can be raised as a shield in a citizen (or EPA) enforcement action. This Court specifically rejected the argument that section 402(k) of the Act shielded

dischargers from prosecution for violations of other sections of the Act:

> Petitioners attach some significance to the fact that compliance with a § 402 permit is "deemed compliance, for purposes of sections 309 [the federal enforcement section] and 505 [the citizen suit section], with section[n]... 306. ..." § 402(k). This provision plainly cannot allow deviations from § 306 standards in issuing the permit. For, after standards of performance are promulgated, the permit can only be issued "upon condition that such discharge will meet ... all applicable requirements under sectio[n] ... 306. ..." § 402(a)(1); and one of the requirements of § 306 is that no new source may operate in violation of any standard of performance. § 306(e). The purpose of § 402(k) seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict.[10]

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10 The Second Circuit quoted this passage from DuPont but omitted the words "from changes in regulations." The Second

Id. at 138, n.28. When permit writers fail to "transform" general standards into specific standards tailored to individual pollutants, that failure should not shield permit holders from lawsuits for discharging pollutants not addressed in their permit.[11]

Circuit's omission significantly broadened section 402(k)'s shield. (A9).

[11] The legislative history of the Act verifies that the focus of § 402(k) is insuring permit stability in the face of new regulations adopted after permit issuance. The purpose of the shield provision identified in the 1972 House Report "is to assure that the mere promulgation of any effluent limitation or other limitation, a standard, or a thermal discharge regulation, by itself will not subject a person holding a valid permit to prosecution." H.R. Rep. No. 92-911, 92nd Cong., 2d Sess. 128 (1972). Thus, neither § 402(k) on its face, nor its legislative history lend any credence to the argument that it can be used to shield a polluter from enforcement action for any reason other than the post permit issuance promulgation of a new effluent limitation. "So construed, Section 402(k) addresses not the problem of how to handle pollutants unknown at the time of permit issuance but rather the problem of rules changes for pollution problems that were known." 2 W. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER, §

Under the reasoning of DuPont, a permit that is issued in violation of a requirement in the Act for permit issuance, such as the requirement in section 402(a)(1) that the issuing agency apply either national effluent limitations or use BPJ to set BAT or BCT standards for all pollutants, would not be protected by the section 402(k) shield.[12]

POINT III. The Second Circuit's decision conflicts with other district court decisions and EPA's own interpretation of the Act.

In United States v. Ketchikan Pulp Co., No. A92-587 (D. Alaska Oct. 5, 1993) (forwarded as supplemental authority by

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4.30 at 443 (1986).

12 See United States v. Ketchikan Pulp Co., No. A92-587 (D. Alaska Oct. 5, 1993) (refusing to find implicit authorization in NPDES permit to discharge pollutants that probably would not have been expressly permitted) (copy of decision sent to Second Circuit on Oct. 13, 1993 but was not discussed in opinion).

Atlantic States to the Second Circuit on October 13, 1993), EPA brought an enforcement action against a polluter that was discharging pollutants not listed in its permit. The District Court held that section 402(k) did not insulate the polluter from liability for the discharge of pollutants which were not covered in its permit. EPA brought a similar case in Louisiana. See United States v. Tennessee Gas Pipeline Co., No. 91-1428 slip op. (W.D. La. Oct. 8, 1991) (appended to Brief of Atlantic States to the Second Circuit, -A1-).

At the very least, there may be division within EPA itself of the proper statutory interpretation. It appears that the enforcement department within the EPA is following the plain language of the statute, while the permit writing department is attempting to relieve

itself of the obligation to follow the statute by creating improper blanket exemptions for the discharge of pollutants. Nowhere in the statute did Congress create a special class of pollutants. Congress could not have made it clearer that the Act was intended to cover all pollutants. See 33 U.S.C. § 1311(a).

Other District Courts have held in citizen enforcement actions that discharges of pollutants not listed in a permit are illegal. See Atlantic States Legal Foundation, Inc. v. Reynolds Metals Co., 31 ERC (BNA) 1156 (N.D.N.Y. 1990) (Appended to Second Circuit Brief of Atlantic States, -A32-); Sparacino v. Anadromous, Inc., No. 89-6417-E (D. Or. Nov. 8, 1990). (Appended to Second Circuit Brief of Amicus Curiae, Natural Resources Defense Council, et al.,

Appendix A).

In the Reynolds case, in which New York State intervened to support Atlantic States, the District Court explicitly upheld citizens' rights to enforce against a polluter that was discharging a pollutant not listed in its permit. The court found the discharge constituted a violation of "the plain language of Section 1311(a)" of the Act and "the clear and unambiguous terms of [the] permit" and was therefore enforceable as a violation of a permit condition pursuant to section 1365(f). Atlantic States Legal Foundation v. Reynolds Metals Co., 31 ERC at 1158. (-A34-35-). Reynolds had the exact permit condition, General Condition 1(b), that Kodak has in this case. New York law requires that condition. NY-ECL § 17-0815(3).

The Second Circuit used two arguments to dismiss the fact that EPA has prosecuted permit holders for discharging pollutants not specifically authorized in a permit. First, the Second Circuit argued that the Ketchikan and Tennessee Gas Pipeline cases involved only failures to report, and not EPA prosecutions for violating § 301 by discharging unauthorized pollutants. (A11). On this score the Second Circuit was flatly wrong. United States v. Ketchikan Pulp Co., slip op., p.3.

Second, the Second Circuit heavily relied upon a 1976 unpublished internal Deputy Assistant Administrator memorandum. (A11) The opinions stated in the 1976 memo, however, were contradicted by EPA the following year. In a 1977 proposed rulemaking, EPA stated:

> Due to a gap in coverage under current NPDES regulations, the discharge of pollutants in addition to those limited in an NPDES permit is not clearly unlawful, even where those pollutants have been indicated in a discharger's permit application. Such a reading of EPA permits, policy, and regulations is inconsistent with statutory directive of the Federal Water Pollution Control Act (i.e., that the discharge of any pollutant is unlawful except in compliance with the terms of an NPDES permit (Section 301(a)), and has resulted in permit enforcement problems, particularly with respect to toxic and hazardous pollutants. The proposed regulations would clarify that the limitations incorporated into an NPDES permit are the sole authorizations to discharge.

42 Fed. Reg. 65,209 (1977) (emphasis added).

In McClellan Ecological Seepage Situation v. Weinberger, 707 F.Supp. 1182, 1201 (E.D. Cal. 1988), that court determined that the discharges referred to but not specifically regulated in a

NPDES permit were under the regulatory ambit of the permit and were not subject to enforcement. Id.

At least one Circuit Court decision has also recognized the scope of the Act's general discharge prohibition on pollutant discharges. In Sierra Club v. Union Oil, 813 F.2d 1480 (9th Cir. 1987), the Ninth Circuit held, "[t]he language of the Act indicates that striving for the utter abolition of pollution is an acceptable approach for states to take." Id. at 1487, n.6. The Ninth Circuit's ruling is entirely consistent with the plain language of the Act and directly conflicts with the Second Circuit's ruling in the present case. Furthermore, even assuming, arguendo, that New York State's legislative prohibition against discharges not specified in a permit is stricter than the federal law, it is

certainly within the contemplation of the Act. The Second Circuit has misread not only the Act's goal of pollution elimination but also states' rights to adopt standards and conditions consistent with that goal. See 33 U.S.C. § 1370.

POINT IV. The issues presented impact all waters of the United States, potentially all dischargers of pollutants and all agencies charged with administering the Clean Water Act, including states' rights and responsibilities of administering the Act.

The Second Circuit's opinion in this case has profound implications for the administration of the Clean Water Act. Should the Second Circuit's decision stand, the goal of pollution elimination can never be realized. Every waterway in the United States into which a polluter discharges could potentially be impacted.

Kodak is certainly not the only polluter discharging pollutants not listed in its permit. The Kodak example

does, however, present an egregious example of this statutorily contradictory practice. Kodak is discharging as many as 300,000 pounds per year of toxic chemical pollutants that are not listed in its permit. The material facts in this case are not in dispute. (A8).

If the Second Circuit is correct that the Environmental Protection Agency (EPA' has allowed the discharge of pollutants not covered in a permit, then the EPA is acting contrary to the Act. The Act plainly does not allow or intend to allow such discharges. As previously discussed, section 402(k) does not provide such a broad shield.

The Second Circuit noted that a regulatory gap seems to exist with regard to the discharge of pollutants not limited in a permit. (A10-11). EPA has also struggled with the reality that the

statute requires no discharge unless authorized by the limits of a permit.

As established in the previous section, EPA itself has brought cases similar to the case at bar based upon the same statutory grounds. See United States v. Ketchikan Pulp Co. and United States v. Tennessee Gas Pipeline, infra, p.40. For the Second Circuit to say that EPA has never acted in a way to support Atlantic States' view of the Act is clearly erroneous. (A10-11).

Regardless of EPA's flip-flopping on this issue, and the evident regulatory gap, there is no statutory gap. The language of section 301(a) clearly prohibits such discharges. 33 U.S.C. 1311(a). The Second Circuit's opinion contradicts this Court's often stated principle that the starting point for interpreting a statute is the statute

itself. See, e.g., Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

CONCLUSION

The decision of the Second Circuit directly contradicts the plain language of the statute and thwarts the legislative scheme intended to move towards the elimination of the discharge of pollutants into the nation's waters. The decision conflicts in principle with previous Supreme Court decisions interpreting the Clean Water Act, particularly this Court's reading of the scope of protection available under section 402(k) of the Act. The differing District Court opinions on this issue, including actions brought by EPA, as well as the Ninth Circuit's recognition of states' rights to prohibit discharges within the confines of the Clean Water

Act, all call for resolution of this issue by the this Court. The issues presented are fundamental to the effective national implementation of the Clean Water Act and provide compelling reasons for this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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DATED: May 17, 1994

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit Dated December 14, 1993.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1624—August Term, 1992

(Argued: June 10, 1993 Decided: December 14, 1993)

Docket No. 93-7091

ATLANTIC STATES LEGAL FOUNDATION, INC.,

Plaintiff-Appellant,

—v.—

EASTMAN KODAK COMPANY,

Defendant-Appellee.

Before:

WINTER, MCLAUGHLIN, and JACOBS,

Circuit Judges.

Appeal from an order of the United States District Court for the Western District of New York (Michael A. Telesca, *Chief Judge*) granting summary judgment against the plaintiff on the ground that there is no provision authorizing a citizen suit alleging that discharges of efflu-

ents not listed in defendant's State Pollutant Discharge Elimination System permit are unlawful.

We affirm.

CHARLES M. TEBBUTT, Buffalo, New York (Edward Cooper, Allen, Lippes & Shonn, Buffalo, New York, of counsel), *for Plaintiff-Appellant.*

PHILIP H. GITLEN, Albany, New York (Elizabeth M. Morss, Carl F. Patka, Whiteman Osterman & Hanna, Albany, New York, of counsel), *for Defendant-Appellee.*

Robert Abrams, Attorney General of the State of New York, Peter Schiff, Deputy Solicitor General, James A. Sevinsky, Val Washington, Assistant Attorneys General, Albany, New York, of counsel, *for the State of New York as amicus curiae.*

Michael Axline, Western Environmental Law Clinic, Eugene, Oregon, Katherine Kennedy, James Simon, National Resources Defense Council, New York, New York, James R. May, Widener University School of Law Environmental Law Clinic, Wilimington, Delaware, Matthew McKeown, Joel Morton, David Simonaitis, Jennifer Wright, Law Students, of counsel, *for Natural Resources Defense Council, et al. as amicus curiae in support of appellant.*

Theodore L. Garrett, Corinne A. Goldstein, Covington & Burling, Washington, D.C., David F. Zoll, Sarah M. Brozena, Chemical Manufacturers Association, Washington, D.C., Robin S. Conrad, National Chamber Litigation Center, Washington, D.C., Cindy Evans, American Forest and Paper Association, Washington, D.C., Ellen Siegler, American Petroleum Institute, Washington, D.C., of counsel, *for Chemical Manufacturers Association, et al. as amicus curiae in support of appellee.*

WINTER, *Circuit Judge*:

This appeal raises the issue of whether private groups may bring a citizen suit pursuant to Section 505 of the Federal Water Pollution Control Act (commonly known as the Clean Water Act), 33 U.S.C. § 1365, to stop the discharge of pollutants not listed in a valid permit issued pursuant to the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1342 (1988). We hold that the discharge of unlisted pollutants is not unlawful under the CWA. We also hold that private groups may not bring such a suit to enforce New York State environmental regulations.

BACKGROUND

Appellee Eastman Kodak Company ("Kodak") operates an industrial facility in Rochester, New York that discharges wastewater into the Genesee River and Paddy Hill Creek under a State Pollutant Discharge Elimination Sys-

tem ("SPDES") permit issued pursuant to 33 U.S.C. § 1342. Appellant Atlantic States Legal Foundation, Inc. ("Atlantic States") is a not-for-profit environmental group based in Syracuse, New York.

Kodak operates a wastewater treatment plant at its Rochester facility to purify waste produced in the manufacture of photographic supplies and other laboratory chemicals. The purification plant employs a variety of technical processes to filter harmful pollutants before discharge into the Genesee River at the King's Landing discharge point (designated Outfall 001) pursuant to its SPDES permit.

Kodak first received a federal permit in 1975. At that time, the pertinent regulatory scheme was the National Pollutant Discharge Elimination System ("NPDES") that was administered directly by the federal Environmental Protection Agency ("EPA"). Subsequently, 33 U.S.C. § 1342(b), (c) delegated authority to the states to establish their own programs in place of the EPA's. As a result, Kodak applied in July 1979 to renew its permit to the New York State Department of Environmental Conservation ("DEC"). The DEC declined to act on Kodak's renewal application, and Kodak's NPDES permit remained in effect. As part of the pending application for a SPDES permit, in April 1982 Kodak provided the DEC with a Form 2C describing estimated discharges of 164 substances from each of its outfalls. Kodak also submitted an Industrial Chemical Survey ("ICS") disclosing the amounts of certain chemicals used in Kodak's facility and whether they might appear in the plant's wastewater. Although the ICS originally requested information on 144 substances, including some broad classes such as "unspecified metals," the DEC restricted the inquiry to chemicals used in excess of specified minimum levels.

On the basis of these disclosures, DEC issued Kodak a SPDES permit, number 000-1643, effective November 1, 1984, establishing specific effluent limitations for approximately 25 pollutants.[1] The permit also included "action levels"[2] for five other pollutants as well as for three of the pollutants for which it had established effluent limits.[3] DEC further required Kodak to conduct a semi-annual scan of "EPA Volatile, Acid and Base/Neutral Fractions and PCB's priority pollutants on a 24-hr. composite sample." In May 1989, Kodak applied to renew the SPDES permit submitting a new Form 2C and ICS, but the 1984 permit will continue to remain in effect until DEC issues a final determination.

Kodak's SPDES permit contains both "general provisions" and "special reporting requirements" pursuant to EPA policy directives devised to implement the Clean Water Act and to DEC policy directives devised to implement both the Clean Water Act and New York law, N.Y. Envtl. Conserv. Law § 17-0815 (McKinney 1984).

The present action arises out of an ongoing dispute between Atlantic States and Kodak during which Atlantic States has claimed that Kodak both exceeded the effluent limits imposed by its SPDES permit and discharged pol-

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[1] UOD, TKN, Ammonia, BOD_5, oil & grease, phosphorus, cyanide, cadmium, chromium, copper, iron, lead, nickel, silver (total and ionic), zinc, mercury, chloroform, 4-Chloro-3,5-dimethylphenol, 1,2-Dichloroethane, 1,2-Dichloropropane, N,N-Dimethylaniline, Dichloromethane, Pyridine, and Xylene.

[2] If the action level is exceeded, the permittee must undertake a "short-term, high-intensity monitoring program." If levels higher than the action levels are confirmed, the permit is reopened for consideration of revised action levels or effluent limits.

[3] The permit set action levels for arsenic, 4,4'Butylidenebis-(6-t-butyl-m-cresol), Isophorone, 1,2,4-Trichlorobenzene, and Triphenyl Phosphate, as well as for Chromium, Copper, and Ammonia which already had established effluent limits.

lutants for which Kodak had no discharge authorization. The procedural history of this dispute is set out in full in our previous decision, *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991) ("*Atlantic States I*"), familiarity with which is assumed.

On November 14, 1991, Atlantic States filed the complaint in the instant matter. The complaint alleged that Kodak had violated Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311, 1342, by discharging large quantities of pollutants not listed in its SPDES permit.[4] The complaint alleged standing to bring suit under the "citizen suits" provision of the Clean Water Act, 33 U.S.C. § 1365. The CWA authorizes any "person or persons having an interest which is or may be adversely affected," to "commence a civil action on his own behalf against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under [the Clean Water Act]" in the district court. 33 U.S.C. § 1365(a), (g). As relief, Atlantic States requested a declaratory judgment as to the alleged violations, an injunction against future violations, authorization for Atlantic States itself to monitor Kodak's wastewater discharges at Kodak's expense for a period of one year after Kodak ceases the alleged violations, copies of all reports and documents filed with EPA or DEC during the same time period, civil penalties

[4] Specifically, the complaint alleged that Kodak had discharged "282,744 pounds of unpermitted pollutants in 1987, 308,537 pounds in 1988, 321,456 pounds in 1989[,] and 290,121 pounds in 1990," and that Atlantic States believed that Kodak continued to discharge such pollutants. The 27 substances Atlantic States alleged that Kodak discharged were acetonitrile, acetone, carbon tetrachloride, catechol, cyclohexane, dibutyl phthalate, diethanolamine, ethylene glycol, glycol ethers, formaldehyde, hydroquinone, manganese, methanol, methyl ethyl ketone, methyl isobutyl ketone, n-butyl alcohol, nitrobenzene, 1,1,1-trichloroethane, 1,1,2-trichloroethane, 1,4-dioxane, 2-ethoxyethanol, 2-methoxyethanol, tert-butyl alcohol, toluene, and trichloroethylene.

of $25,000 per day of violation for each alleged violation, and costs, including attorneys' and witnesses' fees.

After discovery, Atlantic States moved for partial summary judgment as to Kodak's liability in relation to the post-April 1, 1990[5] discharge of one or more of 16 of the 27 pollutants listed in the complaint. The 16 pollutants[6] are all listed as toxic chemicals under Section 313(c) of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023(c). Atlantic States argued that General Provision 1(b) of the SPDES permit and Section 301 of the CWA, 33 U.S.C. § 1311, prohibit absolutely the discharge of any pollutant not specifically authorized under Kodak's SPDES permit. Kodak made a cross-motion for summary judgment on the ground that neither the CWA nor the federal regulations implementing it prohibit discharge of pollutants not specifically assigned effluent limitations in an NPDES or SPDES permit. Kodak further argued that, to the extent the permit may have prohibited discharges of these pollutants, this prohibition is broader than that of the federal NPDES program and therefore not enforceable through a citizen suit under 33 U.S.C. § 1365. On December 28, 1992, the district court denied Atlantic States' motion for partial summary judgment, granted Kodak's cross-motion for summary judgment, and dismissed the case. *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 809 F. Supp. 1040 (W.D.N.Y. 1992). Atlantic States appealed from the judgment entered on that order.

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[5] The Order on Consent, entered into April 5, 1990, between Kodak and DEC resolved the question of Kodak's liability for discharges before April 1, 1990. *See Atlantic States I*, 933 F.2d at 126-27.

[6] Acetonitrile, acetone, dibutyl phthalate, diethanolamine, ethylene glycol, glycol ethers, manganese, methanol, methyl ethyl ketone, methyl isobutyl ketone, n-butyl alcohol, 1,1,1-trichloroethane, 1,1,2-trichloroethane, 1,4-dioxane, 2-methoxyethanol, and toluene.

DISCUSSION

None of the material facts are in dispute[7] and this matter may be properly disposed of by summary judgment.

Atlantic States brought the present action under the citizen suit provision of Section 505, which permits private suits to enforce a CWA "effluent standard or limitation." 33 U.S.C. § 1365(a)(1)(A). Section 505 defines such an enforceable standard or limitation as, *inter alia*, "an unlawful act under . . . section 1311," and "a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter." 33 U.S.C. § 1365(f)(1), (6). The question then is whether Atlantic States' action seeks to enforce an "effluent standard or limitation" imposed by the Act or by Kodak's SPDES permit issued by the DEC.

A. *"Standards and Limitations" of the Clean Water Act*

Atlantic States argues first that the plain language of Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of any pollutants not expressly permitted. With

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[7] Atlantic States' contentions regarding the number and amount of pollutants discharged are not material given our disposition of this matter. Of the 16 substances on which Atlantic States moved for partial summary judgment, seven were listed by Kodak in its permit application, Form 2C, or ICS, or were specifically mentioned in the DEC's 1988 Notice Letter: dibutyl phthalate, ethylene glycol, manganese, 1,4-dioxane, 1,1,1-trichloroethane, 1,1,2-trichloroethane, and toluene. These substances received specific regulatory inquiry. The remaining nine substances appeared on Kodak's Form R's, the source of Atlantic States' information. Kodak must file annually Form R's, a Toxic Chemical Release Inventory Reporting Form, with both EPA and DEC, pursuant to 42 U.S.C. § 11023. Although not listed in Kodak's SPDES permit, these substances were subject to DEC regulation. Even had there been no regulation of the particular substances, Atlantic States would still not have standing to sue unless it could show violations of established regulatory limits.

regard to this claim, therefore, Atlantic States' standing to bring this action turns on the merits of the action itself.

Section 301(a) reads: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." This prohibition is tempered, however, by a self-referential host of exceptions that allow the discharge of many pollutants once a polluter has complied with the regulatory program of the CWA. The exception relevant to the instant matter is contained in Section 402, which outlines the NPDES, 33 U.S.C. § 1342(a), and specifies the requirements for suspending the national system with the submission of an approved state program, 33 U.S.C. § 1342(b), (c). Section 402(k) contains the so-called "shield provision," 33 U.S.C. § 1342(k), which defines compliance with a NPDES or SPDES permit as compliance with Section 301 for the purposes of the CWA's enforcement provisions. The Supreme Court has noted that "The purpose of [Section 402(k)] seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

Atlantic States' view of the regulatory framework stands that scheme on its head. Atlantic States treats permits as establishing limited permission for the discharge of identified pollutants and a prohibition on the discharge of unidentified pollutants. Viewing the regulatory scheme as a whole, however, it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements. Once within the NPDES or SPDES scheme, therefore, polluters may discharge pol-

lutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants.[8]

The EPA lists tens of thousands of different chemical substances in the Toxic Substances Control Act Chemical Substance Inventory pursuant to 15 U.S.C. § 2607(b) (1988). However, the EPA does not demand even information regarding each of the many thousand chemical substances potentially present in a manufacturer's wastewater because "it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants." Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976). "Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit." *Id.* Indeed, Atlantic States conceded at oral argument that even plain water might be considered a "pollutant" under its view of the Act.

The EPA has never acted in any way to suggest that Atlantic States' absolutist and wholly impractical view of

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[8] The cases Atlantic States cites are therefore inapposite because each involves either a failure to correctly disclose accurately the discharge of pollutants and thus comply with regulation or a failure to secure the requisite NPDES or SPDES permit. *Atlantic States Legal Found., Inc. v. Reynolds Metals Co.*, 31 Env't Rep. Cas. (BNA) 1156, 1158 (N.D.N.Y. 1990) (failing to "apply proper detection"); *United States v. Tom-Kat Development, Inc.*, 614 F. Supp. 613 (D. Alaska 1985) (failing to obtain permit); *Kitlutsisti v. ARCO Alaska, Inc.*, 592 F. Supp. 832 (D. Alaska 1984) (failing to obtain permit), *vacated on other grounds*, 782 F.2d 800 (9th Cir. 1986); *Love v. New York State Dep't of Envt'l Conservation*, 529 F. Supp. 832 (S.D.N.Y. 1981) (failing to obtain proper permit).

the legal effect of a permit is valid.[9] In fact, the EPA's actions and policy statements have frequently contemplated discharges of pollutants not listed under a NPDES or SPDES permit. It has addressed such discharges by amending the permit to list and limit a pollutant when necessary to safeguard the environment without considering pre-amendment discharges to be violations calling for enforcement under the CWA. 33 U.S.C. §§ 1319, 1365. The EPA thus stated in its comments on proposed 40 C.F.R. § 122.68(a), which applied the "application-based" limits approach to implementation of the CWA reporting scheme,

> There is still some possibility . . . that a [NPDES or SPDES] permittee may discharge a large amount of a pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements [pursuant to the CWA].

45 Fed. Reg. 33516, 33523 (1980). The EPA's statement went on to note that this possibility constituted a "regulatory gap," and that, "the final regulations control discharges only of the pollutants listed in the [NPDES or SPDES] permit application, which consist primarily of the listed toxic pollutants and designated hazardous substances." *Id.* In a clarification of EPA policy on Section

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[9] Atlantic States' citations to allegedly contrary authority are again inapposite. Atlantic States relies on the court's summary of the U.S. Attorney's argument in a footnote to an unpublished opinion in the Western District of Louisiana, *United States v. Tennessee Gas Pipeline Co.*, No. 91-1428, slip op. at 5 n.4 (W.D.La. Oct. 8, 1991), and a U.S. Attorney's brief in an Alaska case, not signed by any EPA lawyer, involving *inaccurate* reporting of effluent data, Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment and in Support of United States' Cross-Motion for Partial Summary Judgment, *United States v. Ketchikan Pulp Co.*, No. A92-587 (D. Alaska Dec. 14, 1992).

304, 33 U.S.C. § 1314, and water quality-based effluent limitations, an EPA official recently stated that:

> EPA did not intend to require water quality-based permit limitations on all pollutants contained in a discharge . . . . The proper interpretation of the regulations is that developing water quality-based limitations is a step-by-step process. . . . [W]ater quality-based limits are established where the permitting authority reasonably anticipates the discharge of pollutants by the permittee at levels that have the reasonable potential to cause or contribute to an excursion above any state water quality criterion . . . .

Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I-X, at 2-3 (Aug. 14, 1992).

The EPA is the federal agency entrusted with administration and enforcement of the CWA. 33 U.S.C. § 1251(d). As such, EPA's reasonable interpretations of the Act are due deferential treatment in the courts. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). As the Supreme Court has noted in regard to EPA interpretation of the CWA,

> we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.

Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 125 (1985) (quoting *Train v. National Resources Defense Council*, 421 U.S. 60, 75, 87 (1975)). Because the EPA's implementation of the CWA is entirely reasonable, we defer to it.

B. *New York Environmental "Standards and Limitations"*

Atlantic States argues alternatively that the permit itself provides grounds for enforcement of New York State's regulations. States may enact stricter standards for wastewater effluents than mandated by the CWA and federal EPA regulations. 33 U.S.C. § 1342(b). These states' standards may be enforced under the CWA by the states or the EPA, 33 U.S.C. § 1342(h), but private citizens have no standing to do so. New York chose to implement its own environmental policies through its DEC's issuance of SPDES permits pursuant to N.Y. Envtl. Conserv. Law § 17-0815 (McKinney 1984).

However, state regulations, including the provisions of SPDES permits, which mandate "a greater scope of coverage than that required" by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365. 40 C.F.R. § 123.1(i)(2). *Cf. United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1638 (1992) (holding that "penalties prescribed by state statutes approved by EPA and supplanting the CWA" did not "arise under federal law" and thus could not be enforced under 33 U.S.C. § 1319).

Atlantic States relies heavily on General Provision 1(b) of the SPDES permit to show a violation of the CWA. In particular, Atlantic States points to the final clause of that provision that requires, pursuant to N.Y. Envtl. Conserv. Law § 17-0815(3), that

> the discharge of any pollutant not identified and authorized or the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.

However, General Provision 1(b) itself contemplates "new, increased or decreased discharges" that do not "violate the effluent limitations specified in this permit."[10] Moreover, Special Reporting Requirement 2(a) of the SPDES permit specifically contemplates discharges of pollutants not identified by the permit. It states, in relevant part:

> All existing manufacturing . . . dischargers must notify the [DEC] as soon as they know or have reason to believe . . . [t]hat they have begun or expect to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application.

Kodak also must file annually with both EPA and DEC a Toxic Chemical Release Inventory Reporting Form ("Form R"), pursuant to 42 U.S.C. § 11023. Form R's contain estimates of discharges of 317 chemicals and 20 "categories" of chemicals based on the amounts used in the manufacturing process, 42 U.S.C. § 11023(g)(2), 40 C.F.R. § 372.65, but they do not include more precise measurements based on actual discharges such as Non-

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[10] General Provision 1(b) reads:

> b. All discharges authorized by this permit shall be consistent with the terms and conditions of this permit; facility expansions, production increases, decreases, or process modifications which result in new, increased or decreased discharges of pollutants must be reported by submission of a new SPDES application or, if such new, increased, or decreased discharge does not violate the effluent limitations specified in this permit, by submission to the permit issuing authority of notice of such new or increased discharges of pollutants (in which case the permit may be modified to specify effluent limitations or any pollutants not identified and limited herein); the discharge of any pollutant not identified and authorized or the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this per.... shall constitute a violation of the terms and conditions of this permit.

Compliance Reports and monthly Discharge Monitoring Reports required under 33 U.S.C. § 1318.

Like the SPDES permit, the DEC itself contemplates the discharge of unlisted pollutants. In September 1988, DEC notified Kodak that it was aware of 45 substances "reported to have releases to the Genesee River" out of which only 23 were "specifically limited or monitored by the SPDES permit." DEC advised Kodak that although the bulk of these 23 substances either did not appear to be a major concern, or at least did not "appear to be acutely toxic to aquatic life at the levels of discharge indicated," the remaining four[11] should receive "additional attention."

It thus appears that the DEC's view of the SPDES permit is the same as the EPA's. If so, Atlantic States' action fails for reasons stated in Point A above. We need not resolve the issue, however, for, even if Atlantic States is right about New York law, the action would fail because New York would be implementing a regulatory scheme broader than the CWA, *see Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 809 F. Supp. at 1048, and such broader state schemes are unenforceable through Section 505 citizen suits. A citizen's suit under Section 505 is thus barred either because Section 17-0815(3) and the final clause of General Provision 1(b) implement a program with broader scope than that promulgated under the CWA and EPA regulations or because the permit more narrowly interpreted shields Kodak from such an action.

CONCLUSION

For the reasons stated above, we affirm the order of the district court granting summary judgment to Kodak.

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[11] Ethylene glycol, hydroquinone, manganese compounds, and 1,4-dioxane.

Order Amending Opinion of December 14, 1993.

93-7091

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3 day of February, one thousand nine hundred and four.

Present:

Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Honorable Dennis G. Jacobs,
Circuit Judges.

ATLANTIC STATES LEGAL FOUNDATION, INC.,
Plaintiff-Appellant,

v.

EASTMAN KODAK COMPANY,
Defendant-Appellee.

O R D E R

It is now hereby ordered that the opinion issued in this case, *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company*, No. 93-7091, slip op. at 7229 (2d Cir. Dec. 14, 1993), be amended as follows:

Change the sentence beginning at *page 7238, line 20 from:*

"Indeed, Atlantic States conceded at oral argument that even plain water might be considered a 'pollutant' under its view of the Act."

to:

"Indeed, at oral argument Atlantic States could provide no principled reason why water itself, which it conceded to be a chemical, would not be considered a 'pollutant' under its view of the Act."

RALPH K. WINTER
Hon. Ralph K. Winter, *U.S.C.J.*

JOSEPH M. MCLAUGHLIN
Hon. Joseph M. McLaughlin, *U.S.C.J.*

DENNIS G. JACOBS
Hon. Dennis G. Jacobs, *U.S.C.J.*

Decision and Order of Judge Telesca Denying Plaintiff's Motion for Partial Summary Judgment and Granting Defendant's Cross-Motion for Summary Judgment, Filed on December 28, 1992.

91-CV-6471T

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ATLANTIC STATES LEGAL FOUNDATION, INC.,
658 West Onondaga Street,
Syracuse, New York 13204,

Plaintiff,

vs.

EASTMAN KODAK COMPANY,
1669 Lake Avenue,
Rochester, New York 14650,

Defendant.

INTRODUCTION

This action was commenced November 14, 1991, pursuant to §505 of the Federal Water Pollution Control Act (the "Clean Water Act" or "Act"), as amended, 33 U.S.C.A. §1365 (West 1986 and Supp. 1992), which authorizes citizens to commence actions ("citizens suits") against persons alleged to have violated "effluent standards or [other limitations on the release of pollutants into the nation's navigable waters]" established by the Act.

The plaintiff, Atlantic States Legal Foundation, Inc. ("Atlantic States"), is a not-for-profit corporation with its principal place of business in Syracuse, New York. Its members include residents of Rochester who either own property or use recreation facilities in or near the Genesee River and Paddy Hill Creek, which allegedly are affected by the discharges of pollutants from defendant Eastman Kodak Company, Inc. ("Eastman Kodak" or "Kodak") in violation of the Act. Atlantic States alleges that such discharges emanate from Kodak Park, one of defendant's major industrial facilities located in Rochester, New York.

Atlantic States has moved for partial summary judgment on the issue of the liability of defendant Eastman Kodak Company for violating the Clean Water Act by discharging, since April 1, 1990, one or more of 16 pollutants[1] into the water supply. Defendant Kodak has cross-moved for summary judgment dismissing the complaint on various grounds. Upon review of the Clean Water Act itself, its legislative history and current regulatory scheme, and the relevant case law, I find that, when an alleged polluter is subject to a pollution discharge permit issued pursuant to the Clean Water Act, a citizen suit under the Act against the polluter may only address discharges of pollutants expressly regulated by such permit. Accordingly, and for the reasons discussed below, plaintiff's motion is denied, defendant's cross-motion is granted, and the complaint dismissed in accordance with this decision.

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[1] Namely, acetonitrile, acetone, dibutyl phthalate, diethanolamine, ethylene glycol, glycol ethers, manganese, methanol, methyl ethyl ketone, methyl isobutyl ketone, n-butyl alcohol, 1,1,1-trichloroethane, 1,1,2-trichlorethane, 1,4-dioxane, 2-methoxyethanol, and toluene.

BACKGROUND

The Earlier Action—"Kodak I"

Atlantic States commenced an earlier action against Kodak in August 1989.[2] That complaint alleged that New York State (the "State"), through its Department of Environmental Conservation ("DEC"), issued to Kodak a permit under the National Pollutant Discharge Elimination System pursuant to §402(b) of the Act, 33 U.S.C. §1342(b) (a "State NPDES Permit" or SPDES Permit"). This SPDES Permit authorizes Kodak to discharge limited quantities of certain pollutants from its Kodak Park facility into both the Genesee River and the Paddy Hill Creek. The complaint alleged that Kodak's discharges of pollutants had exceeded the limitations of its SPDES Permit on numerous occasions between March 1987 and May 1989. In a decision filed September 18, 1990, I dismissed *Kodak I* as precluded by a prior settlement with the State. On appeal, the Second Circuit vacated that dismissal and remanded *Kodak I* for a determination whether the prior settlement between Kodak and the State had "caused the violations alleged by Atlantic States to cease and eliminated any realistic prospect of their recurrence."[3]

After remand, Atlantic States moved pursuant to Fed. R. Civ. P. 15 to amend its complaint to include both violations of Kodak's SPDES Permit ("exceedances") which had occurred after the filing of the complaint and

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[2] *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., Inc.*, 89-CV-1050 ("*Kodak I*").

[3] *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., Inc.*, 933 F.2d 124, 128 (2d Cir. 1991).

discharges by Kodak of pollutants which are not expressly mentioned in the SPDES Permit. In a decision filed September 27, 1991, I granted Atlantic States's motion insofar as it sought to include in the complaint more recent exceedances of the SPDES Permit and denied the motion insofar as it sought to include discharges of pollutants which are not mentioned in the Permit. *Kodak I* has since settled, and these discharges concerning pollutants not mentioned in Kodak's SPDES Permit form the basis of the complaint in the instant action ("*Kodak II*").

This Complaint

The complaint in *Kodak II* alleges that information submitted by Kodak in the form of "toxic chemical release forms" ("Form Rs")[4] establishes that Kodak is discharging pollutants which it is not authorized to discharge under its SPDES Permit, and that Kodak is, accordingly, violating both its Permit and the Act. Plaintiff seeks a declaration that these discharges violate the Clean Water Act; an injunction against Kodak's continuing discharge of these pollutants; mandatory disclosure to plaintiff by Kodak concerning its activities at Kodak Park relevant to these discharges; and both the maximum civil penalties permitted under the Act and attorney's fees.

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[4] Form Rs are reporting devices which Kodak is required to submit to both the EPA and the State pursuant to §313 of the Emergency Planning and Community-Right-To-Know Act ("EPCRA"), also known as Title III of the Superfund Amendments and Reauthorization Act ("SARA"), 42 U.S.C.A. §11023 (West Supp. 1992).

Plaintiff's Motion for Partial Summary Judgment

In its motion for summary judgment on the issue of Kodak's liability under the Act, Atlantic States relies almost exclusively upon information in Form Rs submitted by Kodak to both the United States Environmental Protection Agency ("EPA") and the State, and upon affidavits interpreting the significance of the Form Rs. Atlantic States argues that Kodak's Form Rs, submitted for the years 1989-91, constitute admissions of violations of the Act sufficient to warrant granting of its motion.

Facilities, such as Kodak Park, which are known to have released toxic chemicals into the environment, must submit Form Rs annually. 42 U.S.C. §11023(a). Form Rs contain detailed information concerning toxic discharges which occur in the normal course of a facility's business. While the Forms are based on chemicals known to be used and/or produced in the ordinary course of business, the information contained therein is essentially the result of a sophisticated process of estimation, including computer models, rather than of precise actual measurement. In this regard, and for purposes of a summary judgment motion, Form Rs differ significantly from the discharge monitoring reports ("DMRs") and non-compliance reports ("NCRs") which formed the basis of Atlantic States' complaint in *Kodak I*. DMRs and NCRs are regular reports of *actual* discharges which a permit holder is required to submit to both the state and the EPA. Courts have consistently found that undisputed DMRs and NCRs constitute sufficient evidence of a permit holder's liability under the Act to warrant granting a motion for summary judgment on that issue. *See, e.g., Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 451 (D.Md.

1985); *Nat. Resource Defense Council v. Texaco Refining*, 719 F. Supp. 281, 289 (D. Del. 1989), *vacated in part on unrelated ground*, 906 F.2d 934 (3d Cir. 1990); *cf. Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532, 536 (W.D.N.Y. 1984) (Summary judgment inappropriate when defendant disputes DMRs.) Thus, even if I were to consider the merits of plaintiff's motion for summary judgment, I would find that plaintiff's submission of Form Rs fails to establish by a preponderance that Kodak has violated the Act as alleged in the complaint.

Defendant's Cross-Motion for Summary Judgment

Kodak does not directly oppose Atlantic States's summary judgment motion; it cross-moves for summary judgment on bases initially pled as affirmative defenses.[5] Kodak argues that this action should be dismissed because the complaint alleges discharges only of pollutants which are not expressly regulated by its SPDES Permit and that such discharges are not the proper subject of a citizen suit under the Clean Water Act. With respect to this argument Kodak relies almost exclusively on the EPA's interpretation of the Act as evidenced in various internal EPA memos.

Alternatively, Kodak argues that the Clean Water Act itself precludes this citizen suit, because it bars such suits when a state "has commenced and is diligently prosecuting an action under a [comparable] state law" and when a state "has issued a final order not subject to

[5] Kodak's thirteenth affirmative defense states that "discharges of pollutants not specifically limited in the SPDES Permit by an effluent limitation for the specified chemical does not violate either the Act or the SPDES Permit." Kodak's fourteenth affirmative defense states that the instant citizen suit is precluded by the Consent Order entered into between Kodak and the State, effective April 1, 1990.

further judicial review and the violator has paid a penalty assessed under . . . [a] comparable state law." 33 U.S.C. §1319(6)(A). Kodak argues that the same Consent Order which formed the basis for this Court's dismissal of *Kodak I* also precludes the instant suit. If I were to reach this alternative argument, I would, on the basis of the record before me, be obliged to deny the motion, because disputed issues of fact remain as to whether Kodak's settlement with the State has actually "caused the violations alleged by Atlantic States to cease and eliminated any realistic prospect of their recurrence." *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., Inc.*, 933 F.2d at 128.

As discussed below, these motions turn on the meaning of the relevant provisions of the Act, a meaning which emerges only upon reading the provisions conjunctively and in light of both the Act's legislative history and its regulatory scheme.

DISCUSSION

Relevant Provisions of the Clean Water Act
The Citizen Suit Provision—33 U.S.C. § 1365

The citizen suit provision under which Atlantic States sues is found in 33 U.S.C. §1365, which provides that

> . . . any citizen may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under [the Act] or (B) an order issued by . . . a State with respect to such a standard or limitation. . .

This citizen suit provision is modeled after a similar provision in the Clean Air Act, and they "share the common central purpose of permitting citizens to abate pollution when the government cannot or will not

command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 384, 98 L.Ed.2d 306 (1987). In providing for citizen suits under these Acts, "Congress [has] made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interest." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (Clean Air Act); *see also Friends of the Earth v. Conrail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (Clean Water Act).

Notwithstanding the importance of citizen suits, the Act imposes certain restrictions on their commencement and prosecution, 33 U.SC. §1365(b)(1)(A)-(B), which restrictions reflect the fundamental purpose of citizen suits under the Act: They are "meant to *supplement* rather than to supplant governmental action." *Gwaltney*, 108 S.Ct. at 383, emphasis added. The citizen suit is intended as a remedy to pollution of which the appropriate governmental agencies have knowledge and which they have taken no meaningful action to abate.

The Purpose of the Act and Its General Prohibition on Pollution— 33 U.S.C. §1311

The first section of the 1972 amendments to the Federal Water Pollution Control Act (the "Clean Water Act" or the "Act") declares the congressional intent of the legislation: [T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters [one goal of which is] that the discharge of pollutants into the navigable waters be eliminated by 1985[.]" 33 U.S.C. §1251(a),(a)(1). In furtherance of this goal, the Act

makes unlawful the discharge of any pollutants into the nation's navigable waters except as authorized by specified sections of the Act. *See* 33 U.S.C. §1311(a).[6]

The language of §1311(a) is plaintiff's first line of defense against this motion; on its face it appears to prohibit any discharge of a pollutant which is not in compliance with certain other sections of the Act. Plaintiff argues that §1311(a)'s prohibition certainly extends to a permit holder's discharge of a pollutant which is either (i) in excess of the limitation set by the permit or (ii) not mentioned, i.e., not permitted, by the permit. Plaintiff's argument relies heavily on a case from the Northern District of New York, *Atlantic States Legal Foundation v. Reynolds Metals Co.*, 31 E.R.C. 1156 (1990), in which the court held that a permit holder violated the Act when it discharged a pollutant (PCBs) not referenced in its permit. *Id.* at 1158. This interpretation of §1311(a) cannot be sustained, however, when that section is viewed in the larger context of the Act itself.

The Purpose of the Act and the NPDES/SPDES Provision-- 33 U.S.C. 1342

Prior to the enactment of the 1972 amendments, the Clean Water Act had emphasized improving water quality rather than preventing water pollution. Water quality standards had been set

> to serve both to guide performance by polluters and to trigger legal action to abate pollution, ...
> . . . [These] standards . . . focused on the tolerable effects rather than the preventable causes of water pollution . . . .

[6] "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

EPA v. California, 426 U.S. 200, 96 S. Ct. 2022, 2023, 48 L.Ed.2d 578 (1976).

The 1972 amendments to the Act were an express acknowledgement that water quality standards had not proven effective in eliminating water pollution, *Id.*, 96 S. Ct. at 2023-24, and

> introduced [ ] major changes in the methods to set and enforce standards to abate and control water pollution. [D]irect restrictions on discharge facilitate enforcement by making it unnecessary to work backward from an over-polluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based [restrictions]—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.
>
> Second, the amendments establish[ed] the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the [new restrictions]. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable [restrictions]—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the amendments provide[d] for direct administrative and judicial enforcement of permits. *Id.*, 96 S. Ct. at 2024-2025, citations and footnotes omitted.

The single most significant change effected in the Clean Water Act by the 1972 amendments is their "primary reliance on the NPDES as a means to abate and control water pollution [which effectively makes

NPDES/SPDES permits] the principal means of enforcing the [Act's] pollution control and abatement provisions." *Id.*, 96 S. Ct. at 2033. Given this focus on the SPDES permit, a citizen suit brought against a permit holder such as Kodak "will necessarily be brought [to enforce the permit or a condition thereof and] **unless the plaintiff can show a violation of the permit condition, violation of [the Act as amended] cannot be established.**" *Id.*, emphasis added. Thus, I find that Kodak's liability in this case must be determined in light, not of the Act's general prohibition of the discharge of pollutants, 33 U.S.C. §1311(a), but of the conditions of Kodak's SPDES Permit.[7]

Atlantic States counters that, even if the alleged discharges are evaluated solely under Kodak's Permit, and not under the general prohibition against the discharge of pollutants at §1311(a), they constitute a violation of the Act. Plaintiff's argument is syllogistic: Every violation of a permit is a violation of the Act; Kodak violated its Permit when it discharged unlisted pollutants; therefore, Kodak violated the Act. At the heart of these motions, then, is the scope of a SPDES permit under the Act: Whether a permit prohibits **only** discharges of pollutants which it expressly restricts and only when they are discharged in excess of the levels permitted in the permit, or whether a permit prohibits every single discharge **except** those in express compliance with the limits imposed by the permit. The Act, its administrative framework, and its legislative history require the adoption of the former interpretation.

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[7] The SPDES Permit presently in effect at Kodak Park is the permit issued in October 1984 with an effective date of November 1, 1984. By its terms, this Permit would have expired Nov. 1, 1989. At that time, and continuing to date, Kodak's application to renew its permit is pending, and the 1984 Permit remains in effect.

In relevant part, 33 U.S.C. §1342 provides that a permit[8] may be issued

> For the discharge of any pollutant, or combination of pollutants, notwithstanding §1311(a) of this Title, upon condition that such discharge will meet either (A) all applicable requirements under §§1311, 1312, 1316, 1317, 1318, and 1343 of this Title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the administrator determines are necessary to carrying out the provisions of this Chapter.

33 U.S.C.A. §1342(a)(1). (West Supp. 1992).

Thus, the Act expressly authorizes the issuance of a SPDES permit, "**notwithstanding §1311(a) of this Title[.]**" (Emphasis added.) While this language of the statute indicates that discharge of a pollutant by the holder of a SPDES permit is not to be considered under §1311(a)'s general prohibition of all discharges of pollutants, it does not definitively resolve the issue of the scope of such a permit.

Section 1342 is certainly one more "provision in which Congress' limpid prose [does not] put [ ] an end to all dispute." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 381, 98 L.Ed.2d 306 (1987) (noting the ambiguity of the language of 33 U.S.C. §1365, the Clean Water Act citizen suit provision.) Nevertheless, merely "to acknowledge ambiguity is not to conclude that all interpretations are

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[8] The Act provides for the issuance of both National Pollution Discharge Elimination System permits ("NPDES") and State Pollution Discharge Elimination System permits ("SPDES"). As previously discussed, Kodak Park is currently operating under a SPDES permit. Any differences between the permits are not relevant to this discussion.

equally plausible." *Id.* As discussed earlier, NPDES/SPDES permits are "the principal means of enforcing the [Clean Water Act's] pollution control and abatement provisions." *EPA v. California*, 96 S. Ct. at 2033. The Act itself, *see* 33 U.S.C. §1342, and the regulations promulgated thereunder, *see* 40 C.F.R. §122.41 *et seq.* (1991), prescribe such detailed and involved procedure for the establishment of discharge limits under permits, that it strains all credulity to propose that Congress, having enacted such detailed legislation, and having authorized the EPA to adopt such detailed regulations, could have contemplated that a discharge by a permit holder of a pollutant **never even referenced in its permit** would form the basis of a permit violation cognizable under the Act's citizen suit provision. In coming to this conclusion, I acknowledge that it is nowhere explicitly stated in the Act itself. Nevertheless, I find that this interpretation comports not only with the statutory scheme of the Act but also with its legislative history.

Relevant Legislative History

Senate Report 92-414 discusses at some length the parameters of a citizen suit under the Act:

> [The citizen suit provision] would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, (sic) would not require reanalysis of technological in (sic) other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

S. Rep. No. 92-414, 92d Cong., 2d Sess. 1972, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745 (1972).

The Senate Report further provides that:

> [w]hether abatement is sought by an agency or by a citizen, there should be a considerable record available to the courts and any enforcement proceeding resulting from the Federal and State administrative standard-setting procedures. Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.

Id. at 3746.

The Senate Report further reflects Congress's understanding that, "[u]nder the Bill, citizens themselves may go to United States District Courts against those who violate effluent standards or compliance orders." *Id.* at 3677.

There is simply no reconciling this legislative history with plaintiff's broad interpretation of the permit scheme as sweeping within its regulation not only those pollutants which were considered throughout the administrative procedure of issuing permits, but also *any other* discharge of pollutants. *See also U.S. v. Hooker Chemicals and Plastics Corp.*, 749 F.2d 968, 979-80 (2d Cir. 1984); *State of New York v. U.S.*, 620 F. Supp. 374, 383-85 (E.D.N.Y. 1985) (citizen suits must concern violations of standards *already* established administratively.)

Relevant Administrative Regulations

Finally, as Kodak vigorously argues, the EPA itself has recognized that "a permittee may discharge a . . . pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee as

long as the permittee complies with the notification requirements of [the regulations]." 45 Fed. Reg. 33516, 33523 (May 19, 1980). This view is confirmed by various internal EPA memoranda submitted by Kodak in support of this motion, and plaintiff has provided no evidence of any contrary position on the part of the EPA.

Atlantic States argues that, insofar as this regulation and the agency internal memoranda would preclude this citizen suit, they contradict the Clean Water Act on its face and are accordingly unreasonable and unenforceable. Atlantic States's challenge to the reasonableness of the EPA's position is founded on the Act's general prohibition against the discharge of pollutants, 33 U.S.C. 1311(a). As previously discussed, however, the statutory and regulatory scheme of the Act takes enforcement actions against permit holders **outside** that general prohibition, and I have neither found nor been cited to any language in the Act or in the applicable case law which would render unreasonable the EPA's view on this issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).[9]

[9] "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Alternative Bases for Liability Under the Act

Atlantic States alternatively argues that New York Environmental Conservation Law §17-0815(3) and the corresponding language in Kodak's SPDES Permit provide bases for this citizen suit. Section 17-0815(3) requires New York State SPDES permits to include the provision that "the discharge of any pollutant not identified and authorized by such permit ... shall constitute a violation of the permit[.]" General Condition 1(b) of Kodak's SPDES Permit incorporates that requirement.

Kodak argues, however, that federal regulation precludes enforcement under the Act and its regulatory scheme of restrictions which are broader in scope than federal law requires; that General Condition 1(b) of Kodak's Permit is broader in scope than is required under the Act; and that General Condition 1(b) is, therefore, not part of a program enforceable under the Act. *See* 40 C.F.R. 123.1(i)(2)(1991) (Where "an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.")

Atlantic States counters that the requirements of N.Y.E.C.L. §17-0815(3) are not **broader**, but only **stricter**, than the express conditions of Kodak's permit, and that such stricter enforcement is contemplated by both 33 U.S.C. §1342 and the regulations promulgated thereunder, *see* 40 C.F.R. 123.1(i)(1) ("Nothing ... precludes a State from [a]dopting or enforcing requirements which are more stringent or more extensive than those required under [federal regulation.]" Such a view would, indeed, permit imposition of liability under the Act against a permit holder for the discharge of pollutants not expressly regulated by such permit, and

not only for the discharge of regulated pollutants in excess of any limits established either by permit or by federal law or regulation.

Neither linguistic analysis nor logic supports Atlantic States's interpretation of N.Y.E.C.L. §17-0815(3) as merely a stricter version of the applicable federal law and regulations. Imposing liability for **any** discharge of a pollutant, whether it has been the subject of the administrative permit procedure or not, would clearly broaden the parameters of enforcement of a citizen suit under the Act. That kind of expansion is simply not cognizable under the Act and the applicable case law. *See McLellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182, 1199 (E.D.Cal. 1988), and cases cited *supra* at 14. (Citizen Suits limited to seeking enforcement of administratively established "effluent standards or limitations.")

CONCLUSION

The abatement of all contamination of our precious water supply by pollutants is the goal of the Clean Water Act. Congress chose to effect that goal through a permit system which is founded on the administrative determination of levels of pollution which are, given our present state of technological knowledge, acceptable or unacceptable. Plaintiff's frustration with this system, and with the level of pollution discharge it continues to permit, is understandable. Nevertheless, accepting plaintiff's view of the reach of the Act would effectively circumvent the permit system and expand the scope of a citizen suit under the Act; it "would change the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney*, 108 S.Ct. at 383. I cannot agree that Congress intended such a result.

WHEREFORE, plaintiff's motion for partial summary judgment is denied; defendant's cross-motion for summary judgment is granted; this case is dismissed.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESCA
Michael A. Telesca
United States District Judge

DATED: Rochester, New York
December 28, 1992

Judgment by Court Clerk Dismissing the Action, Filed on December 28, 1992

CASE NUMBER: 91-CV-6471T

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ATLANTIC STATES LEGAL FOUNDATION, INC.,

v.

EASTMAN KODAK COMPANY.

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[xx] **Decision by Court.** This action came to ~~trial~~ or hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is dismissed.

December 28, 1992
Date

Rodney C. Early
Clerk

LEIGH ANN LESTER
Leigh Ann Lester
(By) Deputy Clerk

33 USC § 1251

Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for

recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States.

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the

policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act [33 USC §§ 1342, 1344]. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established

by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

* * *

33 USC § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USC §§1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives.

In order to carry out the objective of this Act there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USC §1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USC §1317]; and

* * *

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USC §1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the

national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USC §1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USC §1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USC §1314(b)(2)], or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which

meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [33 USC §1317];

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USC § 1314(b)], and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USC §1314(b)], and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USC §1314(b)], and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in

the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 USC § 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 USC § 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1,

1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USC §1314(b)], and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) [33 USC §1342(a)(1)] in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such

limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable.

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(e) All point discharge source application of effluent limitations.

Effluent limitations established pursuant to this section or section 302 of this Act [33 USC §1312] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Chapter.

33 § 1314. Information and Guidelines

(c) Pollution discharge elimination procedures

The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement

standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

33 USC § 1312. Water quality related effluent limitations

(a) Establishment.

Whenever, in the judgment of the Administrator or as identified under section 304 (l) [33 USC §1314 (l)], discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act [33 USC §1311(b)(2)], would interfere

with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations.

* * *

(2) Permits.

(A) No reasonable relationship.

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this Act) from achieving such limitation.

* * *

(c) Delay in application of other limitations.

The establishment of effluent limitations under this section shall not operate to delay the application of any

effluent limitation established under section 301 of this Act [33 USC §1311].

33 USC § 1312. Water quality related effluent limitations

(June 30, 1948, ch 758, Title III, §302, as added Oct. 18, 1972, P. L. 92-500, §2, 86 Stat. 846.)

(As amended Feb. 4, 1987, P. L. 100-4, Title III, §308(e), 101 Stat. 39.)

33 U.S.C. 1342 National pollutant discharge elimination system

* * *

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge

will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a

statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which --

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same

extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the

permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the

identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this tile if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing

pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under

section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants

immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

33 U.S.C. 1362(6) & (12) Definitions

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to

facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. 1365(a) Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf --

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. 1365(f)

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this

title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

33 § 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition,

pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters of such States.

(June 30, 1948, c. 758, Title V, § 510, as added Oct. 18, 1972, Publ.L. 92-500, § 2, 86 State. 893.)

§ 17-0815. SPDES permits; additional terms and conditions

SPDES permits shall include the following provisions, terms, requirements and conditions;

1. that all discharges authorized by the permit shall be consistent with the provisions, terms, requirements and conditions of such permit.

2. that facility expansions, production increases or process modifications by the permittee which result in new or increased discharges of pollutants into the waters of the state shall be reported by the permittee by submission of a new SPDES application.

3. that the discharge of any pollutant not identified and authorized by such permit or the discharge of any pollutant more frequently than or at a

level in excess of that permitted by such permit shall constitute a violation of the terms of the permit.

* * *

40 CFR § 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

No permit may be issued:

(a) When the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA;

(b) When the applicant is required to obtain a State or other appropriate certification under section 401 of CWA and § 124.53 and that certification has not been obtained or waived;

(c) By the State Director where the Regional Administrator has objected to issuance of the permit under § 123.44;

(d) When the imposition of conditions cannot ensure compliance with

the applicable water quality requirements of all affected States;

(e) When, in the judgment of the Secretary, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge;

(f) For the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste;

(g) For any discharge inconsistent with a plan or plan amendment approved under section 208(b) of CWA;

(h) For any discharge to the territorial sea, the waters of the contiguous zone, or the oceans in the following circumstances:

(1) Before the promulgation of guidelines under section 403(c) of CWA (for determining degradation of the

waters of the territorial seas, the contiguous zone, and the oceans) unless the Director determines permit issuance to be in the public interest; or

(2) After promulgation of guidelines under section 403(c) of CWA, when insufficient information exists to make a reasonable judgment whether the discharge complies with them.

(i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections

301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

[48 FR 14153, Apr. 1, 1983, as amended at 50 FR 6940, Feb. 19, 1985]

40 CFR § 122.41 Conditions applicable to all permits

(applicable to State programs, see § 123.25).

The following conditions apply to all NPDES permits. Additional conditions

applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit.

(a) **Duty to comply.** The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

* * *

(b) **Duty to reapply.** If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the

permittee must apply for and obtain a new permit.

(c) **Need to halt or reduce activity not a defense.** It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

40 CFR § 122.41 Conditions applicable to all permits
(applicable to State programs, see § 123.25).

* * *

(f) **Permit actions.** This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated

noncompliance does not stay any permit condition.

(g) Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) Duty to provide information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

* * *

(l) Reporting requirements. (1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical

alterations or additions to the permitted facility.

Notice is required only when:

(i) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in § 122.29(b); or

(ii) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged.

This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under § 122.42(a)(1).

(iii) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition,

or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan;

* * *

(Information collection requirements are approved by the Office of Management and Budget under control number 2040-0004, 2040-0110 and 2040-0068)

(Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

[48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39620, Sept.

1, 1983; 49 FR 38049, Sept. 26, 1984; 50 FR 4514, Jan. 31, 1985; 50 FR 6940, Feb. 19, 1985; 54 FR 255, Jan. 4, 1989; 54 FR 18783, May 2, 1989]

Effective Date Note: Information collection requirements in paragraph (l)(1) have not been approved by the Office of Management and Budget, and are not effective, pending OMB approval.

40 CFR § 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

40 CFR § 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405 (National Pollutant Discharge Elimination System-NPDES) of CWA.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator shall approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program. (Permit programs under section 405(f) of CWA (sludge management programs) may be approved under 40 CFR part 501 independently of a section 402 permit program.)

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain

jurisdiction until the matter is resolved.

* * *

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies

but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

* * *

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

40 CFR § 123.1 Purpose and scope.

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the

additional coverage is not part of the Federally approved program.

Note: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

[48 FR 14178, Apr. 1, 1983, as amended at 54 FR 256, Jan. 4, 1989; 54 FR 18784, May 2, 1989]

40 CFR § 123.25 Requirements for permitting.

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that a State which chooses not to administer a sludge management program pursuant to section 405(f) of the CWA as part of its NPDES program is not required to have legal authority to implement the portions

of the following provisions which were promulgated after the enactment of the Water Quality Act of 1987 (Pub. L. 100-4) and which govern sewage sludge use and disposal. In all cases, States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.4-(Prohibitions):

(2) § 122.5(a) and (b)-(Effect of permit);

(3) § 122.7(b) and (c)-(Confidential information);

(4) §122.21 (a)-(b), (c)(2), (e)-(k), and (m)-(p)-(Application for a permit);

(5) § 122.22-(Signatories);

(6) § 122.23-(Concentrated animal feeding operations);

(7) § 122.24-(Concentrated aquatic animal production facilities);

(8) § 122.25-(Aquaculture projects);

(9) § 122.26-(Storm water discharges);

(10) § 122.27-(Silviculture);

(11) § 122.28-(General permits), Provided that States which do not seek to implement the general permit program under § 122.28 need not do so.

(12) Section 122.41-(Applicable permit conditions)(Indian Tribes can satisfy enforcement authority requirements under § 123.34).

(13) § 122.42-(Conditions applicable to specified categories of permits);

(14) § 122.43-(Establishing permit conditions);

(15) § 122.44-(Establishing NPDES permit conditions);

(16) § 122.45-(Calculating permit conditions);

(17) § 122.46-(Duration);

(18) § 122.47(a)-(Schedules of compliance);

(19) § 122.48-(Monitoring requirements);

(20) § 122.50-(Disposal into wells);

(21) § 122.61-(Permit transfer);

(22) § 122.62-(Permit modification);

(23) § 122.64-(Permit termination);

(24) § 124.3(a)-(Application for a permit);

(25) § 124.5 (a), (c), (d), and (f)-(Modification of permits);

(26) § 124.6 (a), (c), (d), and (e)-(Draft permit);

(27) § 124.8-(Fact sheets);

(28) § 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e)-(Public notice);

(29) § 124.11-(Public comments and requests for hearings);

(30) § 124.12(a)-(Public hearings); and

(31) § 124.17 (a) and (c)-(Response to comments);

(32) § 124.56-(Fact sheets);

(33) § 124.57(a)-(Public notice);

(34) § 124.59-(Comments from government agencies);

(35) § 124.62-(Decision on variances);

(36) Subparts A, B, C, D, H, I, J, K and L of part 125; and

(37) 40 CFR parts 129, 133, subchapter N and 40 CFR part 503.

Note: States need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make

one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of parts 122 and 124. See, for example, § 122.5(d) (continuation of permits) and § 124.4 (consolidation of permit processing).

For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of § 122.41 or by requiring more prompt notice of an upset.

(b) State NPDES programs shall have an approved continuing planning process under 40 CFR 35.1500 and shall assure

that the approved planning process is at all times consistent with CWA.

* * *